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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DOMINIC LOUIS LEBRON

Defendant and Appellant.

G057512

(Super. Ct. No. 12CF0360)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger. Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Stephanie H. Chow, Deputy Attorney General, for Plaintiff and Respondent.

We appointed counsel to represent Dominic Louis Lebron on appeal. Counsel filed a brief that set forth the facts of the case. Counsel did not argue against her client but advised the court she found no issues to argue on Lebron's behalf.

Counsel filed a brief following the procedures outlined in *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). The court in *Wende* explained a *Wende* brief is one that sets forth a summary of proceedings and facts but raises no specific issues. Under these circumstances, the court must conduct an independent review of the entire record. When the appellant himself raises specific issues in a *Wende* proceeding, we must expressly address them in our opinion and explain why they fail. (*People v. Kelly* (2006) 40 Cal.4th 106, 110, 120, 124.)

Pursuant to *Anders v. California* (1967) 386 U.S. 738, to assist the court with its independent review, counsel provided the court with information as to issues that might arguably support an appeal. Counsel raised the following two issues: (1) did the trial court err by failing to appoint counsel to represent Lebron pursuant to Penal Code section 1170.95, subdivision (c) (all further statutory references are to the Penal Code)?; and (2) did the court err by denying the petition for resentencing pursuant to section 1170.95 because Lebron was convicted of felony murder or murder under a natural and probable consequences theory?

We gave Lebron 30 days to file written argument on his own behalf. Thirty days have passed, and Lebron has not filed any written argument.

Upon our independent review of the record, we identified an issue that may, if resolved favorably to Lebron, result in reversal of the judgment. Section 1170.95, subdivision (c), states, in relevant part, "If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner." Here, Lebron requested counsel, but the court failed to appoint counsel.

We invited the parties to file supplemental letter briefs on the following issue: Did the trial court err by failing to appoint counsel after Lebron requested the court appoint counsel for him during the resentencing process?

We have reviewed the record in accordance with our obligations under *Wende* as well as the supplemental briefing. We conclude Lebron was not entitled to counsel and we found no other arguable issues on appeal. We affirm the judgment.

### FACTS

An information charged Lebron, Franco Viera, and Sean Vernon Struck with willful, deliberate, and premeditated attempted murder (§§ 664, subd. (a), 187, subd. (a)) (count 1); assault with a deadly weapon (§ 245, subd. (a)(1)) (count 2); and street terrorism (§ 186.22, subd. (a)) (count 3). The information alleged they committed counts 1 and 2 for the benefit of a criminal street gang (§ 186.22, subd. (b)). It further alleged Lebron suffered a prior serious and violent felony (§§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1)), and a serious felony (§ 667, subd. (a)(1)).

In June 2014, Lebron pleaded guilty to all counts and admitted the enhancements and his prior conviction. Lebron offered the following factual basis for his pleas and admissions: “On [February 6, 2012,] I did willfully unlawfully and knowingly aid and abet Sean Struck to take a direct but ineffectual step toward killing John Doe. When I did so it was with premeditation and deliberation with the specific intent to kill John Doe. I also aided and abetted Sean Struck to use a knife to stab John Doe. I did so knowing this would cause serious injury to him. When I committed the above acts I was an active participant of the Pearl Street gang. I know its members engaged in a pattern of criminal activity and I willfully assisted and promoted criminal conduct by Pearl Street gang members. I committed the above crimes for the benefit of and in association with the Pearl Street gang with the intent to promote and further criminal conduct by Pearl Street gang members. Pearl Street gang is an ongoing organization with a common sign

or symbol with [three] or more members. I know that Pearl Street gang members engage in a pattern of criminal gang activity including attempted murder, robbery assaults with deadly weapons and illegal possession of firearms by felons and or gang members. I also know that these crimes are some of the primary activities of the Pearl Street gang.”

In July 2014, pursuant to a plea agreement with the court and over the prosecution’s objection, the trial court ordered stricken for sentencing purposes the section 664, subdivision (a), and 186.22, subdivision (b)(1), allegations. Citing Lebron’s young age and lack of lengthy criminal history, the court ordered the enhancement stricken in the interests of justice. The court sentenced Lebron to the low term of five years on count 1 and five years on the serious felony enhancement for a total prison term of 10 years. The court imposed concurrent terms on counts 2 and 3.

In early 2019, Lebron filed a petition for resentencing pursuant to section 1170.95. In the petition Lebron indicated, “I request that this court appoint counsel for me during this re-sentencing process.” The trial court did not appoint counsel and denied the petition. The court found Lebron had not made a prima facie case for relief. The minute order reflecting the court’s ruling appears to be a standardized minute order that includes two different bases for denial. The minute order stated the following: “The petition does not set forth a prima facie case for relief under the statute. A review of court records indicates [Lebron] is not eligible for relief under the statute because [Lebron] does not stand convicted of murder or [Lebron’s] murder conviction(s) is not based on felony-murder or on a natural and probable consequences theory of vicarious liability for aiders and abettors.” Lebron filed a timely notice of appeal.

#### DISCUSSION

Section 1170.95, subdivision (a), provides, in relevant part, “A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner’s

murder conviction vacated and to be resentenced on any remaining counts . . . .” The new statute, enacted as part of Senate Bill No. 1437 (S.B. 1437), modified the law relating to accomplice liability for murder but does not mention the crime of attempted murder.

Arguments have been made the statute should be expanded beyond its wording to include attempted murder, but we are not persuaded. Our colleagues in the Second District recently addressed this issue in *People v. Lopez* (2019) 38 Cal.App.5th 1087 (*Lopez*), review granted November 13, 2019, S258175 (Cal. Rules of Court, rule 8.1115(e)(1) [while review pending may rely on for persuasive value]). The *Lopez* court concluded S.B. 1437 excluded any relief for individuals convicted of attempted murder. (*Lopez, supra*, 38 Cal.App.5th at p. 1104.) It noted this conclusion was supported by S.B. 1437’s plain language and legislative history. (*Lopez, supra*, 38 Cal.App.5th at p. 1105.) In citing S.B. 1437’s repeated use of the term “murder” and the absence of the use of the term “attempted murder,” the court concluded the Legislature’s intention to limit relief to those convicted of the completed crime of murder was clear. (*Lopez, supra*, 38 Cal.App.5th at p. 1105.) We find the *Lopez* court’s reasoning persuasive and conclude S.B. 1437 does not apply to attempted murder, the crime of which Lebron stands convicted.

We now turn to the issue of appointment of counsel. Section 1170.95, subdivision (c), provides in relevant part the following: “The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner.”

Here, the minute order was not specific, but we infer the trial court found Lebron was statutorily ineligible for relief because he was not convicted of murder. Such a finding was based on a simple application of the statute. Lebron was not entitled to

S.B. 1437 relief because he was not convicted of murder, and the trial court could summarily deny his petition based on a preliminary review of the charges. Any error in not appointing counsel was harmless beyond a reasonable doubt because Lebron could not make an arguable showing as a matter of law. Under the circumstances of this case, appointment of counsel was not required.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.